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## E-disclosure: Lay your cards on the table

Author: Mike Brown

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*Recent rulings indicate that judges are getting tougher when considering e-documentation. Mike Brown extols the virtues of getting e-disclosure tactics out in the open*

Determining proportionality in litigation has long been a bit of a string-measuring exercise. However, the gap between opposing parties has become wider than ever in recent years as the move from paper to electronic business documents has resulted in an explosion of document volume involved in discovery exercises. Now, it seems, the UK courts are catching up with the issue.

Mr Justice Morgan's ruling in *Digicel v Cable & Wireless* at the High Court last year has sent shivers down the spines of many lawyers and litigation support professionals, as it highlighted the need for advisers to approach the discovery process in the right way. In particular, it is clear that judges are becoming less tolerant of parties taking a unilateral approach to determining the scope of discovery.

The claimant in the case, Digicel, (a mobile phone company operating in seven jurisdictions in the Caribbean) alleges that the defendant, Cable & Wireless (C&W), which provides the telephone network in much of the Caribbean - deliberately conspired to prevent other companies from entering the market by delaying key meetings and other initiatives to facilitate interconnection within the C&W networks.

C&W's attempt last year to have the case struck out at the interlocutory hearing was rejected because of the failure to prove, via the documents produced during disclosure, that the claimant's case was too weak to proceed.

In particular, the defendants had decided not to restore back-up tapes going back to 2001 containing emails and other documents, claiming that to do so would be disproportionate. The judge ruled that as the claimants were alleging conspiracy by the defendants to conceal facts in the case, that the two sets of lawyers had failed to adequately agree in advance on what should and should not be disclosed - or on what search methodology to deploy - meant that the case could not be disposed, and it will now proceed to full trial. While the judgment went against C&W, the judge criticised both sides' unwillingness to 'meet and confer' before embarking on their respective discovery procedures.

What the Digicel case demonstrates is that taking unilateral action on discovery runs a real risk that a wider search will need to be performed again, at significant cost to the party involved. The ultimate cost to the parties - and to C&W in particular - was undoubtedly higher than if both sides had made attempts in the first instance to restore a reasonable amount of data during the data retrieval process.

This ruling also underlines the importance for parties in a dispute to engage in an early case management conference in order to agree on both the scope of the discovery process and the methodology. This so-called 'meet and confer' process is almost standard procedure in the US and is becoming increasingly common on this side of the Atlantic too.

### In the balance

One key to getting this balance right is to ensure that a meeting is held as early in the process as possible, even before the initial hearing. Another is to involve the provider of e-disclosure services early in the process. The Digicel ruling is a catalyst for the evolution of the role of e-disclosure providers towards a more consultative role, beyond supplying just the technological solution.

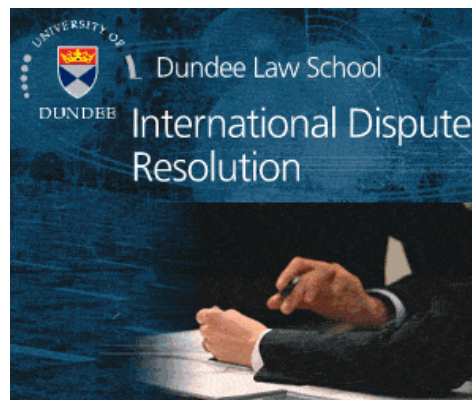
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Managing risk to ensure

A good e-disclosure vendor should be able to advise on the best review strategy, taking into account the client's IT system, data archiving policies, data formats and data preservation requirements as well as considering how best to tackle the review of large data volumes.

The sooner an e-disclosure vendor is involved in a case, the greater strategic influence they can bring to ensure that the project is conducted as cost-efficiently as possible. They can do this by pre-filtering the document set to make it more manageable; using de-duplication and near de-duplication tools; and using progressive tools such as concept searching to keep search costs down.

### Mapping the process

Moreover, electronic evidence also presents other technical and procedural issues with which e-disclosure providers can help. What, for example, constitutes 'chronological order' when the date on the face of a document may be different from the creation and modification dates contained in its 'metadata' (the invisible record of when a document was created, modified and who has read it)? Although there are a number of working parties trying to develop standards for handling electronic evidence, there is, as yet, little common ground at such a micro level.

It is also increasingly important that litigants are able to describe and demonstrate the methodology they used to recover documents as well as the scope of a disclosure exercise. Very often, different parties will be using different technology and methods to conduct their respective searches, and bringing the e-disclosure vendors into the initial meeting can help the parties to develop and document a common approach to the process and explain it to the court if necessary.

While involving e-disclosure providers in this way may increase upfront costs, which can seem disconcerting to the client when little legal argument has yet been added to the case, it will invariably reduce the time and cost of a document review during the course of a dispute through the reduction of billed lawyer time by focusing on the core document population - and prevent clients from finding themselves on the wrong side of a ruling like Digicel.

*Mike Brown is international sales director for Epiq Systems.*

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